

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RODNEY MUNNERLYN,

Petitioner,

-V-

STEVEN E. RACETTE,

Respondent.

JESSE M. FURMAN, United States District Judge:

The Court previously referred this petition for a writ of habeas corpus from a state court conviction, filed pursuant to Title 28, United States Code, Section 2254, to Magistrate Judge Sarah Netburn for a Report and Recommendation. (Docket No. 4). In a Report and Recommendation filed on July 16, 2014, Magistrate Judge Netburn recommended that the petition be denied. (Docket No. 16). By Order entered August 14, 2014, this Court adopted the Report and Recommendation to the extent that it recommended denial of Petitioner's ineffective-assistance claims, but reserved judgment on whether to adopt it to the extent it recommended denial of Petitioner's claim regarding the presentation of expert testimony at trial. The Court directed the parties to file supplemental memoranda addressing whether Petitioner had fairly presented the latter claim to the state courts insofar as he had raised the issue in his application for leave to the New York Court of Appeals. Respondent filed a memorandum addressing that question on August 27, 2014. (Docket No. 18). Petitioner, who failed to submit any objections to the Report and Recommendation in the first instance, filed nothing.

Upon due consideration of the record, including Respondent's supplemental

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ORDER ADOPTING
REPORT AND
RECOMMENDATION

memorandum, the Court hereby adopts the Report and Recommendation in its entirety. As Respondent notes (Resp.'s Supp. Mem. 3), the Second Circuit has held that “[p]resenting a claim for the first time to a state court of discretionary review is insufficient to exhaust the claim unless the court considers it.” *Lurie v. Wittner*, 228 F.3d 113, 124 (2d Cir. 2000). That is what happened here, as Petitioner (arguably) presented the claim to the New York Court of Appeals, but that Court declined to review Petitioner’s case and therefore did not consider the claim.

In light of the foregoing, the Court finds that Magistrate Judge Netburn’s Report and Recommendation is correct as a matter of law, and certainly not clearly erroneous on the face of the record. *See, e.g., Wilds v. United Parcel Serv.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003). Accordingly, it is hereby adopted in its entirety and the petition is dismissed.

As Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue at this time. *See* 28 U.S.C. § 2253(c); *see also, e.g., Matthews v. United States*, 682 F.3d 180, 185 (2d Cir. 2012). In addition, this Court certifies, pursuant to Title 28, United States Code, Section 1915(a)(3), that any appeal from this Order would not be taken in good faith, and *in forma pauperis* status is thus denied. *See Coppedoe v. United States*, 369 U.S. 438, 444-45 (1962).

The Clerk of Court is directed to mail a copy of this Order to Petitioner and to close this case.

SO ORDERED.

Dated: October 7, 2014
New York, New York



JESSE M. FURMAN
United States District Judge